# No. 16,304

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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ESTATE OF J. LESLIE VOGEL, ROBERT G. PARTRIDGE and ELIZABETH S. VOGEL, Executors,

*Petitioners,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

**On Petition for Review of the Decision of the Tax Court of the United States.**

## BRIEF FOR PETITIONERS.

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### JURISDICTIONAL STATEMENT.

This is a petition to review a decision of the Tax Court of the United States.

The petitioners are executors of an estate of a decedent who died August 16, 1950, a resident of California (R. 26). The estate tax return was filed with the Collector of Internal Revenue for the 1st District of California, at San Francisco, California. The hearing before the Tax Court of the United States was

held in San Francisco (R. 54). The proceedings were held pursuant to a 90-day letter issued February 14, 1955 by the District Director of the San Francisco Office of the Commissioner of Internal Revenue (R. 9), a petition for redetermination by the taxpayer was filed April 26, 1955 (R. 3, 5), and was answered by the Commissioner of Internal Revenue (R. 17).

The findings of fact and opinion of the Tax Court were rendered April 28, 1958 (R. 25); the decision was entered August 8, 1958 (R. 49). The petition for review was filed September 25, 1958 (R. 50-51).

The Tax Court had jurisdiction under 26 U.S.C. 7442. The Court of Appeals for the Ninth Circuit has jurisdiction under 26 U.S.C. 7482, 7483 (Internal Revenue Code of 1954, Section 7482).

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## STATEMENT OF THE CASE.

This case involves a deficiency in estate tax in the sum of $29,601.88. The Commissioner disallowed the marital deduction and treated all property of decedent and his spouse as community property. The estate tax return was prepared on the basis that the property included therein was the separate property of decedent with the exception of (1) Insurance listed in Schedule D, returned as community property, and (2) Jointly Owned Property, Schedule E. The return showed, under Schedule E, as the property of

the surviving joint tenant, a savings account, Bank of America, Marina Branch, in the amount of $19,668.96, and Series E, U. S. Savings Bonds, valued at $19,-585.00, standing in the name of Mrs. Elizabeth S. Vogel or Les Vogel.

The Commissioner added to the gross estate as community property the foregoing bank account and Series E, U. S. Savings Bonds. In addition, there was added to the gross estate as community property the following property not included in the return and claimed by petitioners to be the separate property of the surviving spouse:

| | |
|---|---|
| 4 shares Pacific Turf Club stock, valued at | $1,700.00 |
| 500 shares Pacific Gas & Electric Redeemable, First Preferred stock, valued at | 7,156.25 |
| 467 shares Bank of America stock, valued at | 6,333.69 |
| 217 shares Pacific Gas & Electric Common stock, valued at | 3,499.13 |
| 250 shares Leslie Financing Company, valued at | 5,627.62 |
| Anzavista Apartment property, valued at | 8,800.00 |
| Savings Account, Marina Branch, Bank of America, valued at | 1,181.74 |

The Commissioner in treating all property as community property decreased all expenses of administration and debts of decedent by one-half, except for the disallowance in full of maintenance and upkeep of a boat which is not in issue.

The Commissioner disallowed the marital deduction. The Commissioner decreased the family allowance from $1,500.00 per month for eighteen (18) months to $1,000.00 per month for eighteen (18) months and reduced the amount further by one-half (on a community property basis).

The issues are:

A. The character of the property involved, whether community property or the separate property, respectively, of decedent and his surviving spouse, by transmutation from community property or by purchase from separate earnings.

B. Whether or not such property was transmuted into separate property, and, if so, did the transmutation take place exclusive of the year 1942, and prior to April 2, 1948 so as to qualify for the marital deduction.

C. Whether or not $1,500.00 per month for eighteen (18) months for family allowance was reasonable under the circumstances.

D. Whether or not the full amount of funeral expenses are deductible in computing the tax.

E. Whether or not additional attorneys' fees in the amount of $2,500.00 paid counsel for petitioners are deductible from the gross estate in computing the tax.

Petitioner does not contest the disallowance of maintenance and upkeep on boat claimed as an administration expense.

## SPECIFICATION OF ERRORS RELIED UPON BY PETITIONERS.

1. The Tax Court erred in holding that the evidence failed to establish that a transmutation took place and that the Commissioner correctly determined that the entire property of decedent and his spouse was community property.

2. The Tax Court erred in holding that the evidence did not establish that a family allowance in excess of $1,000.00 per month, to wit, $1,500.00 per month, for eighteen (18) months was a reasonable and proper deduction from the gross estate.

3. The Tax Court erred in failing to allow as a deduction in computing the tax additional attorneys' fees in the amount of $1,000.00 paid subsequent to filing of the petition for redetermination and prior to the decision of the Tax Court.

4. The Tax Court erred in failing to allow the full amount of funeral expenses as a deduction in computing the tax.

### First Specification of Error—Findings of the Tax Court and Objections Thereto.

With respect to the first specification of error the Tax Court found as follows:

> "Findings of Fact
>
> Some of the facts are stipulated, the stipulation being incorporated herein by this reference.
>
> Decedent, J. Leslie Vogel, died August 16, 1950, a resident of California. A Federal estate tax return was filed on February 15, 1952, by the execu-

tors of his estate with the collector of internal revenue for the First District of California.

On January 15, 1934, the Les Vogel Chevrolet Company was incorporated to operate an automobile agency. The stock of the corporation was community property of J. Leslie Vogel (hereinafter referred to as decedent or Les Vogel), and his wife, Elizabeth S. Vogel (hereinafter sometimes referred to as Elizabeth Vogel or Elizabeth).

In 1942, decedent, in order to avoid the application of the excess profits tax, to admit his son, Les Vogel, Jr., into the business, and for other reasons, decided to dissolve the corporation and to form a limited partnership. The corporate minutes indicate that the assets of the corporation were transferred to decedent as of midnight, December 31, 1942. A resolution was written in 1942 looking to the dissolution of the corporation. The partnership agreement was executed on February 6, 1943, and named Elizabeth Vogel and Les Vogel, Jr., as limited partners, with decedent as a general partner for a term of ten years from January 1, 1943, each having an equal share in the profits. The opening entries in the partnership ledger show the following capital accounts:

| | |
|---|---|
| Les Vogel | $33,147.71 |
| Les Vogel, Jr. | 33,147.70 |
| Mrs. Les Vogel | 33,147.70 |

Separate drawing accounts were maintained for each partner. Income tax payments were charged to the respective drawing accounts. Other than income tax, the only charge to Elizabeth's account was a monthly allowance of $100 and a monthly payment of $500 on an F.H.A. loan on

the family residence. Taxes on the residence were charged to decedent's drawing account.

On November 1, 1946, the business was again incorporated. The partnership balance sheet, as of October 31, 1946, filed with the application for incorporation, showed the following

| | |
|---|---|
| Accounts payable: | |
| Les Vogel | $ 66,083.09 |
| Elizabeth Vogel (Mrs. Vogel) | 73,880.64 |
| Les Vogel, Jr. | 37,664.26 |
| | $177,627.99 |
| Partners' capital: | |
| Les Vogel | $ 32,709.22 |
| Elizabeth Vogel | 32,709.20 |
| Les Vogel, Jr. | 32,709.20 |
| | $ 98,127.62 |

The opening balance sheet for the corporation showed the following:

| | |
|---|---|
| Capital stock | $150,000.00 |
| Accounts payable: | |
| Les Vogel and Elizabeth Vogel | $105,382.15 |
| Les Vogel, Jr. | 20,373.46 |
| | $125,755.61 |

In order to provide a $50,000 payment by each partner for the stock issued, the amounts necessary to bring each of the partnership capital accounts up to $50,000 were taken from the accounts payable. One-third of the stock in the new corporation was issued to each of the former partners.

Decedent and Elizabeth held theirs individually in their own names. The value of the capital stock was subsequently increased to $300,000 with 30,000 shares outstanding. At the time of decedent's death, decedent, Elizabeth, and Les Vogel, Jr., each held 10,000 shares.

Decedent and Elizabeth maintained two savings accounts in both their names, a savings account in the name of Elizabeth Vogel, and a checking account in the names of Les or Elizabeth Vogel.

Following the dissolution of the partnership the separate drawing accounts of decedent and Elizabeth were combined into one account on the books of the corporation. Various investments and personal expenses of decedent, along with other items, were charged against this account. With the exception of income tax, the only charge to the account specifically applicable to Elizabeth was a $3,000 gift to their son. A similar $3,000 gift to the son from the decedent was charged against the account on the same day. On October 31, 1947, the remaining balance was divided into two equal parts of $11,662.05. One part was deposited in the savings account at the Marina Branch of the Bank of America in the name of Elizabeth Vogel. Some of decedent's salary checks were also deposited there. Later, these amounts were transferred to the checking account.

The other portion of the drawing account was deposited in the savings account in the name of Les or Elizabeth Vogel at the Polk-Van Ness Branch of the Bank of America. It was subsequently withdrawn.

The principal deposits to the savings account in the name of J. Les and Elizabeth Vogel at

Branch 253 of the Bank of America were salary checks of the decedent. Elizabeth made most of these deposits; it was her practice to retain $100 to $300 from the checks for household expenses and to deposit the balance. Transfers were made from this account to the checking account.

Not all salary checks were deposited in the savings accounts; a number were deposited in the checking account. Decedent made payments from the checking account for his own individual expenditures, for joint living expenses, and for investments in Elizabeth's name.

Decedent and Elizabeth maintained separate brokerage accounts, decedent's account being opened in 1946 and Elizabeth's in 1948. Purchases by decedent during 1946 and 1947 were charged to his partnership drawing account prior to the partnership dissolution on October 31, 1946, and to their drawing account on the corporation's books subsequent to that date. Investments in Elizabeth's brokerage account were paid for from the checking account.

Payment for 467 shares of Bank of America stock standing in Elizabeth Vogel's name was also made from the checking account.

In 1948 or 1949 the Leslie Financing Company was formed by Elizabeth Vogel, Les Vogel, Jr., and Dorothea Vogel. Each contributed $10,000 to the initial capital. Elizabeth obtained the necessary funds from previous investments.

About 1950 Elizabeth purchased a parcel of real property from Arthur M. Hardy, an old friend of the family. Hardy then designed and built the Anzavista Apartments on the property. All of Hardy's negotiations in the matter were with

Elizabeth and the apartments were built for her. The record is inconclusive as to the source of the funds for the apartment venture.

During a conversation with an internal revenue agent after decedent's death, Elizabeth referred to the Anzavista's property as decedent's. She further represented that whatever property she and decedent had belonged to both of them. At the trial Elizabeth referred to the Anzavista property as 'the whole family's.'

The tax returns of decedent and Elizabeth Vogel for 1940 and all subsequent years were prepared by Lawrence H. Goebel, a certified public accountant. The information for these returns was mostly obtained from the office manager of the Les Vogel Chevrolet Company. Goebel reviewed the returns with the decedent, but could not recall discussing the nature of the property with him. Goebel assumed that the income from the various sources was community property, to be split accordingly.

Separate Federal returns were filed for the years 1946 and 1947, and joint returns for the years 1948, 1949, and 1950. Separate state returns were filed for the entire period 1946 through 1950. Historically, dividends were divided between decedent and Elizabeth Vogel. This was also true of dividends from stock registered in decedent's or Elizabeth Vogel's name, or both names jointly. It was true of capital gain or loss on the sale of such securities. The dividends from the Les Vogel Chevrolet Company were always divided equally between decedent and Elizabeth Vogel.

On the 1947 Federal return the capital gains on the sale of securities were described as commu-

nity. On the 1947 state returns the total income reported was described as community.

Upon the advice of attorneys, decedent's and Elizabeth Vogel's dividends were segregated for the first time on the 1950 state tax returns filed after decedent's death.

Robert G. Partridge was decedent's personal attorney for approximately 15 years, beginning in the mid-1930's. Partridge and his associate, Wallace O'Connell, prepared two wills for decedent. The first will was executed December 13, 1946. The second was never signed.

The first will contained the following provisions:

> Fourth: All property in which at this time I have an interest or which stands in the name of myself or myself and my wife, either as tenants in common or as joint tenants, is community property. It is my intention to dispose not only of all property which I am entitled to dispose of by will, including my separate estate and my share of the community property, but of the entire community estate. If my wife, prior to the probate of this will, shall not have elected whether she shall take under this will or the rights given her by law, she shall in due course following my death, make such election. She shall, in any event, however, be entitled to exempt property and family allowance out of my estate.

Notes taken by Partridge during a discussion with decedent prior to the drafting of the first will included the words 'transmutation agreement (Jan. 1, '43).' Partridge had had no inde-

pendent knowledge of this subject and wrote down only what information decedent communicated to him. At no time during their discussions concerning the will did decedent show Partridge any written agreement which would have transmuted community to separate property.

Decedent and Partridge never discussed the transmutation of any property other than the Les Vogel Chevrolet Company.

The second, and unsigned, will was drafted for decedent in 1950. A draft of a proposed will for Elizabeth Vogel was prepared at approximately the same time. Both drafts refer to a written agreement converting their community property to separate property.

During discussions concerning the second will Partridge suggested to decedent that it would be best to have some expression of the transmutation agreement in writing. No agreement transmuting the property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual existence of such an agreement, either oral or written.

Partridge did not know in fact whether there ever was a transmutation." . . .

"The respondent determined that the entire gross estate of decedent and Elizabeth Vogel was community property and recomputed the tax on a community property basis. The following assets standing in the name of Elizabeth Vogel were added to the gross estate:

| | | |
|---|---|---|
| 4 | shares Pacific Turf Club stock | $1,700.00 |
| 500 | shares Pacific Gas & Electric redeemable first preferred stock | 7,156.25 |
| 467 | shares Bank of America stock | 6,333.69 |
| 217 | shares Pacific Gas & Electric common stock | 3,499.13 |
| 250 | shares Leslie Financing Company | 5,627.62 |
| | Anzavista Apartments property | 8,800.00 |
| | Savings Account, Marina Branch of Bank of America | 1,181.74" |

The petitioners take exception to the portion of the foregoing findings as follows (R. 33): "No agreement transmuting the property was ever prepared by Partridge or O'Connell and none was introduced in evidence, nor did any witness testify to the actual existence of such an agreement, either oral or written."

That portion of the record hereinafter quoted is considered to be testimony that such an agreement existed (R. 138-139):

> "A. Mr. Vogel—these notes now remind me—had taken a position when he talked to me initially that this property had been transmuted. He didn't know the details, and I didn't either, frankly. I felt that in order to sanctify the situation or to implement it, shall I say, assuming it had been done in the first place, it would be better to have some expression in writing, and I suggested that to him, and that is reflected in those later notes that are now in evidence—I have forgotten the exhibit number—but again it was something, a relationship something like this, Mr. Resnick: Mr. (Testimony of Robert G. Part-

ridge) Vogel was not skilled in the law or in the ways of business or estates of this sort. When he did talk to me initially he always took the position, 'This is Mrs. Vogel's property,' as her own, but was never able to very clearly, or at all clearly, tell me why it was. Therefore, when you ask me whether I pursued it, I did at the time this second will was discussed, and at that time said we ought to set it down in writing so there would be no question about it.

Q. Did you discuss that at all with Mrs. Vogel?

A. Not to my recollection.

Q. And Mr. Vogel used the term 'separate property' and the term 'community property'?

A. Undoubtedly, but I can't sit here and tell you that I specifically remember it. Whatever terms he used, may I say, that he conveyed to me, as we were discussing these matters, that he was under that impression, the interest of Mrs. Vogel in the company was her own property, as such, call it separate, as it should be, or otherwise, the effect that I gathered or the understanding that I gathered from his discussions was the same." (R. 138-139.)

**Second Specification of Error—Findings of the Tax Court.**

As to the reasonableness of the deduction for family allowance, the Tax Court found as follows:

"At the time of decedent's death, decedent, Elizabeth Vogel, their son Les Vogel, Jr., and their daughter Dorothea lived in a three-story detached dwelling at 369 Marina Boulevard, San Francisco. Both Les, Jr., and Dorothea were over 21. The residence, located in a wealthy neighborhood, had been acquired in 1941 and was held in

the name of Les Vogel and Elizabeth Vogel as joint tenants.

They employed a full-time maid and a gardener; the maid 'lived in.' Elizabeth also, on occasion employed caterers; she entertained approximately once a month.

During his lifetime most of decedent's salary, which was about $1,800 a month, was expended in maintaining the home.

After decedent's death, Les Vogel, Jr., and Dorothea continued to occupy the house with their mother and a servant. Neither Les Vogel, Jr., nor Dorothea made any contribution to the maintenance of the home, either before or after decedent's death.

On September 7, 1950, Elizabeth Vogel filed a petition with the Superior Court of the State of California, San Francisco County, for a family allowance of $1,500 a month from the estate of J. Leslie Vogel. On September 19, 1950, the Judge of the Superior Court entered an order granting the allowance. During the probate of the estate, checks totalling $27,000 were paid to Mrs. Vogel as a family allowance.

Decedent's will was admitted to probate and Elizabeth Vogel filed an election to take under its provisions on September 12, 1952.

A Federal estate tax return was filed on February 15, 1952. Various securities and miscellaneous assets were treated on the return as decedent's separate property. No reference was made to certain property standing in the name of Elizabeth Vogel alone. Deductions were claimed on the return for a bequest to surviving spouse (marital deduction) of $61,077.66 and an allow-

ance for support of dependents (family allowance) paid to Elizabeth Vogel totalling $27,000.00 ($1,500 per month for 18 months)." (R. 34-35)

It is contended by petitioners that such findings sustain petitioners' position that $1,500 per month for 18 months should be fully allowed as a deduction.

**Third and Fourth Specifications of Error.**

Petitioners contend that the allowance or disallowance of additional attorneys' fees and the inclusion of the full amount or only one-half of the funeral expenses as deductions from the gross estate are questions of law and procedure and such deductions should be allowed in full.

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## ARGUMENT.

### FIRST SPECIFICATION OF ERROR—THE TAX COURT ERRED IN HOLDING THAT THE EVIDENCE FAILED TO ESTABLISH THAT A TRANSMUTATION TOOK PLACE AND THAT THE COMMISSIONER CORRECTLY DETERMINED THAT THE ENTIRE PROPERTY OF DECEDENT AND HIS SPOUSE WAS COMMUNITY PROPERTY.

The evidence supports the following facts:

1. The original accumulations of decedent and his spouse, including stock of Les Vogel Chevrolet Company, prior to 1943 were community property (R. 26).

2. A limited partnership was formed on January 1, 1943, consisting of Elizabeth Vogel and Les Vogel, Jr., as limited partners and decedent as a general

partner with each having separate drawing and capital accounts (R. 27).

3. On November 1, 1946, approximately a month and a half after decedent's probated will was executed (R. 27, 32), the business was again incorporated. Stock was issued individually in the names of decedent, his spouse, and his son with one-third outstanding stock issued to each.

4. On October 31, 1947 the balance of the corporation drawing account of decedent and his spouse was divided into two equal parts. One part was deposited in a savings account in the name of Elizabeth Vogel (R. 29).

5. In 1948 or 1949 the Leslie Financing Company was formed by Elizabeth Vogel, her son, and her daughter (R. 30). Elizabeth obtained her $10,000 contribution from previous investments.

6. In 1950 Elizabeth Vogel acquired the Anzavista property in her own name.

7. The following assets were acquired by Elizabeth Vogel and stood in her name:

| | |
|---|---|
| 4 shares Pacific Turf Club stock | $1,700.00 |
| 500 shares Pacific Gas & Electric redeemable preferred stock | 7,156.25 |
| 467 shares Bank of America stock | 6,333.69 |
| 217 shares Pacific Gas & Electric common stock | 3,499.13 |
| 250 shares Leslie Financing Company | 5,627.62 |
| Anzavista Apartments property | 8,800.00 |
| Savings account, Marina Branch of Bank of America | 1,181.74 |

8. Notes taken by decedent's personal attorney prior to drafting the first will included the words "transmutation agreement (January 1, 1943)."

Petitioner contends that the Tax Court correctly stated the law to the following extent (R. 36-37):

> "In California, community property may be transmuted to separate property by oral agreement between the spouses.[1] *Tomaier v. Tomaier,* 23 Cal. 2d 754, 146 P. 2d 905 (1944). It is not always necessary to show oral agreement; the status of the property may be demonstrated by the nature of the transaction or appear from the surrounding circumstances. *Long v. Long,* 88 Cal. App. 2d 544, 199 P. 2d 47 (1948)."

The Tax Court further stated the following to be the law (R. 37):

> "It should be noted, however, that property acquired by either the husband or the wife, or both, after marriage is presumed to be community property, and one asserting that such property is separate rather than community has the burden of establishing that fact.[2] *Wilson v. Wilson,* 76 Cal. App. 2d 119, 172 P. 2d 568 (1946)".

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[1]Cal. Civ. Code: Sec. 158. Contracts with each other and third persons: Husband and Wife May Make Contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the Title on Trusts.

[2]Cal. Civ. Code: Sec. 164. Community property; presumptions as to property acquired by wife; limitation of actions.

All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter

The Tax Court further stated (R. 38):

> "There is a disputable presumption in California law that property acquired by a married woman by an instrument in writing is her separate property.[3] *Nichols v. Mitchell,* 32 Cal. 2d 598, 197 P. 2d 550 (1948). Petitioners, however, may not depend on this presumption alone to overcome the respondent's determination that the property in question is community. Cf. *Shea v. Commissioner,* 81 F. 2d 937 (C.A. 9, 1936), affirming 30 B.T.A. 1265."

In *Nichols v. Mitchell,* 32 Cal. 2d 598, cited by the Tax Court the evidence showed that all community assets were put in the wife's name to protect them from creditors and the Court held that such evi-

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acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property, but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

In cases where a married woman has conveyed or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

[3]Cal. Civ. Code, Sec. 164, supra.

dence would overcome the presumption arising from Section 164 of the California Civil Code.

The case of *Shea v. Commissioner* is not applicable in that the property involved therein was either the *husband's* separate property or community property and none was claimed to be the separate property of the wife.

In California the wife enjoys a more favorable status than her husband with respect to separate property as a result of the presumption arising from Section 164 of the California Civil Code.

This Court recognized this distinction in the case of *Acme Distributing Company v. Collins,* 247 F. 2d 607, with respect to property standing in the name of the wife. The Court there said:

> "A full and scholarly discussion of this entire subject is to be found in the recent case of Nevins v. Nevins, 1954, 129 Cal. App. 2d 150, 153-154, 276 P.2d 655, 657, petition for a hearing by the State Supreme Court denied, 1955. There the Court used the following language:
>
> "From the earliest period of California history Courts have adhered to the Spanish law rule accepted in community property states that the presumption attending the possession of property by either husband or wife is that it belongs to the community. Exceptions to the rule must be proved, and the burden rests with the claimant of the separate estate. [Cases cited.]
>
> "In 1889, however, by direct statutory change, the foregoing general rule was modified as to properties held in the wife's name. In those situations,

according to the addition to Civil Code, §164, where property is acquired during marriage by a married woman by an instrument in writing, the presumption is not that the property is community, but the contrary, that it is separate. [Authorities cited] The burden is then upon the husband seeking to claim the property for the community. [Cases cited] Originally this portion of Civil Code, section 164, was limited to conveyances of real property [Authorities cited] but a further amendment in 1927 extended its application to acquisition of any interest in or encumbrance on real or personal property. [Authorities cited.]

"As against the husband, the presumption is disputable, and may be controverted by other evidence, direct or indirect. But the evidence to overthrow the presumption must be 'clear and convincing'. [Cases cited.] Whether or not it is so controverted is a question of fact for the trial Court, its conclusions, unless manifestly without sufficient support in the evidence, being conclusive on appeal. [Cases cited.]"

In *Auener v. Suiter,* 1920, 46 Cal. App. 301, 304, 189 P. 120, 121, the Court said:

"We have, then, a case where the wife held a grant, bargain, and sale deed of the property executed to her as sole grantee. This is strong evidence in favor of the respondent's case and must prevail unless overcome by other evidence.

" 'It is true that the presumption established by section 164 of the Civil Code is not conclusive but may be disputed and overcome by other testimony. *Nevertheless, however, the presumption is itself evidence which may outweigh the positive*

*testimony of witnesses against it,* and will stand as evidence in the case until it is overcome by other testimony.' [Cases cited.]" [Emphasis supplied.]

The rule in favor of the wife has been recognized to the extent that payments from community funds on the husband's property give rise to a community interest in the property while payments from community funds on property standing in the name of the wife are presumed, in the absence of an agreement to the contrary, to constitute a gift to her. (*Estate of Bernatas* (1958) 162 C.A. 2d 693, 328 P. 2d 539.)

In the case of *Ciambetti v. Dept. Alcoholic Bev. Control,* 161 Cal. App. 2d 340 (1958) at page 345, 326 P. 2d 535 the Court said:

"[2] It is the general rule that '. . . the character of property as separate or community is fixed as of the time it is acquired. The character so fixed continues until it is changed in some manner recognized by law, as by agreement of the parties.' (*Garten v. Garten,* 140 Cal. App. 2d 489, 492 [295 P. 2d 23].) [3] 'The law will not allow idle presumption to be indulged in as against a deed delivered and recorded. Facts must be proven from which it is clearly made to appear that the property, in such case, is community property, or the deed will be given effect according to its terms.' (*Alferitz v. Arrivillaga,* 143 Cal. 646, 649 [77 P. 657].) [1b] Here the evidence shows without conflict that the real property was purchased in plaintiff's name as sole grantee, as was the license. [4] Under such circumstances it is the presumption, under section 164 of the Civil Code, that

the property so purchased was the separate estate of the wife. It is a strong presumption *(Acme Distributing Co. v. Collins,* 247 F. 2d 607) and cannot be overthrown except by clear and convincing proof. (*Attebury v. Wayland,* 73 Cal. App. 2d 1, 5 [165 P. 2d 524].) Nor can it be rebutted solely by evidence as to the source of the funds. (*Gudelj v. Gudelj,* 41 Cal. 2d 202 [259 P. 2d 656].) It is the further rule that the money which was borrowed on the credit of such property was also plaintiff's separate estate. [1c] The fact that both spouses joined in the execution of the deeds of trust or mortgages given to secure the notes evidencing the loans did not alter the original status of the property. *(Dyment v. Nelson,* 166 Cal. 38 [134 P. 988].) The improvements, even if made by the husband upon the wife's separate property and out of community funds, gave him no interest therein. *(Holtze v. Holtze,* 2 Cal. 2d 566 [42 P. 2d 323].) Nor could the other incidental acts of the husband in relation to the management of the property be considered as acts indicating ownership such as would overcome the presumption. *(Kimbro v. Kimbro,* 199 Cal. 344 [249 P. 180].)"

It is respectfully submitted that as to the property standing in the name of Elizabeth Vogel, the presumption arising from Section 164 of the California Civil Code that such property was her separate property has not been overcome by clear and convincing evidence. To the contrary, the evidence concerning the treatment of the property by decedent, including his understanding thereof as conveyed to his attorney, lends further support to the presumption that the property was the separate property of Elizabeth Vogel.

SECOND SPECIFICATION OF ERROR—THE TAX COURT ERRED IN HOLDING THAT THE EVIDENCE DID NOT ESTABLISH THAT A FAMILY ALLOWANCE IN EXCESS OF $1,000.00 PER MONTH, TO WIT, $1,500.00 PER MONTH FOR EIGHTEEN (18) MONTHS WAS A REASONABLE AND PROPER DEDUCTION FROM THE GROSS ESTATE.

The amount of $1,500.00 per month for eighteen (18) months was reasonable and no more than necessary to support the widow in the same manner she was accustomed to in the past. In *Estate of Louis Richards v. Commissioner,* 20 T.C. 904, the Court said:

> "In the administration of the estate of the decedent the probate Court allowed the sum of $1,500 per month as an allowance from the estate for the support of the widow during the administration of the estate. Under such allowance the total sum of $30,000 was paid over a period of 20 months and approved by the Court. Respondent, in determing the deficiency, reduced this allowance to $22,500. Decedent left a considerable estate and the allowance granted by the Court was no more than necessary to support the surviving spouse in the same manner she was accustomed to in the past. Her expenditures for living expenses during the period in question have been shown to be in excess of the amount allowed. There is no evidence that the administration of the estate was prolonged for an unreasonable time in order to secure an excessive allowance. Under such circumstances we have concluded that the allowance was reasonable, and respondent's action in reducing this item is reversed."

The facts herein come within the limitations prescribed by Reg. 105, Sec. 81.40 which states:

"* * * The support of dependents of the decedent during the settlement of the estate is deductible but pursuant to the following rules:

(a) In order to be deductible, the allowance must be authorized by the laws of the jurisdiction in which the estate is being administered, and not in excess of what is reasonably required.

(b) The allowance for which deduction may be made is limited to support during the settlement of the estate. Any allowance for a more extended period is not deductible.

(c) There must be an actual disbursement from the estate to the dependents, but after payment has been made the right of deduction is not affected by the fact that the dependents do not expend the entire amount for their support during the settlement of the estate."

In *Estate of Ralph Rainger,* 12 T.C. 483 on page 498, this Court said:

"It is apparent that the widow and children are dependents of the decedent within the meaning of *Estate of Jacobs,* 8 T.C. 1015. It is apparent also that California grants a family allowance of support in accordance with a prior mode of living. See *Estate of Bump,* 152 Cal. 274; 92 Pac. 643; *Estate of Cowell,* 164 Cal. 636; 130 Pac. 209. The amount of support is not conditioned by the fact that the dependents may have had separate income. *Estate of Middlekauff,* 2 T.C. 203.

However, after applying the statute and quoted regulations to the facts as disclosed by the record, and having considered all the pertinent factors pointed out by the parties hereto, we have reached the conclusion, already appearing in our findings

> of fact, that the amount of $50,000 constitutes an allowance for the support of decedent's dependents during the settlement of the estate which was reasonably required and actually expended."

It is respectfully submitted that the family allowance paid in the amount of $1,500.00 per month for eighteen (18) months was a proper deduction from the gross estate.

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**THIRD SPECIFICATION OF ERROR—THE TAX COURT ERRED IN FAILING TO ALLOW AS A DEDUCTION IN COMPUTING THE TAX ADDITIONAL ATTORNEYS' FEES IN THE AMOUNT OF $1,000 PAID SUBSEQUENT TO FILING OF THE PETITION FOR REDETERMINATION.**

Counsel for petitioners was paid $1,000 for representing petitioners at the trial of the matter before the Tax Court (R. 185, 186). This amount is a proper deduction. *Estate of Frank F. Tillotson v. Commissioner,* 44 B.T.A. 644; *Leewitz v. Commissioner,* 75 F. Supp. 312; Estate Tax Regulations 105 Sec. 81.34.

> "Reg. 105, Sec. 81.34 Attorney's fees.—The executor or administrator, in filing the return, may deduct such an amount of attorney's fees as has actually been paid, or in an amount which at the time of such filing it is reasonably expected will be paid. If on the final audit of a return the fees claimed have not been awarded by the proper Court and paid, the deduction will, nevertheless, be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local

law and practice. If the deduction is disallowed in whole or in part on final audit, the disallowance will be subject to modification as the facts may later require.

A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time such deficiency is contested or such refund claim is prosecuted. A deduction for such fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed. . . ."

Counsel has been paid an additional $1,500 for prosecuting this appeal for which claim is hereby made for allowance of said amount as a deduction from the gross estate.

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**FOURTH SPECIFICATION OF ERROR—THE TAX COURT ERRED IN FAILING TO ALLOW THE FULL AMOUNT OF FUNERAL EXPENSES AS A DEDUCTION IN COMPUTING THE TAX.**

This specification of error is solely a question of law. In computing the tax the Commissioner allowed only one-half of the funeral and administration expenses as a deduction from the gross estate (R. 13) which figures were presented by respondent in their computation under Rule 50 of the Tax Court (R. 45, 46) and objected to by petitioners (R. 47).

The administration's expenses are deductible in full except for community property involved. Where the estate consists entirely of community property, funeral

expenses for the decedent and allowances for the support of dependents are deductible in the full amounts thereof from the decedent's gross estate. See *Estate of Worth S. Lee,* 11 Tax Court 141.

In the interest of justice this Court has power to decide whether such deductions should be allowed even though not raised by the pleadings. *Hormel v. Helvering,* 312 U.S. 552; *U. S. v. Merrill,* 211 F. 2d 297.

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**CONCLUSION.**

It is respectfully submitted that the Tax Court was in error in the specifications herein set forth and judgment should be rendered in favor of petitioners.

Dated, Richmond, California,
June 1, 1959.

Respectfully submitted,
GRANT G. CALHOUN,
*Attorney for Petitioners.*